

Laborers District Council of Baltimore and Vicinity, affiliated with the Laborers International Union of North America, AFL-CIO and Potts & Callahan, Inc. and Carpenters District Council, Baltimore and Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 5-CD-268

December 6, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Potts & Callahan, Inc., herein called the Employer, alleging that Laborers District Council of Baltimore and Vicinity, affiliated with the Laborers International Union of North America, AFL-CIO, herein called Laborers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by Laborers rather than to employees represented by Carpenters District Council, Baltimore and Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Carpenters.

Pursuant to notice, a hearing was held on February 8, 9, and 19, 1982, before Hearing Officer Peter J. Eide. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer filed a brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.²

¹ Maryland Heavy and Highway Contractors Association, Inc., and its members have filed a motion to intervene in this proceeding so that they would be parties in the event the Board agreed with the Employer's position that a broad award should be issued herein. However, as stated in fn. 7, *infra*, we find that a broad award is not warranted on the facts of this case and therefore deny the motion.

² The Employer has excepted to the refusal of the Hearing Officer to admit into evidence letters sent to the Acting Regional Director from Carpenters' attorney during the prehearing investigation of the charge. We find that the Employer has not been prejudiced by the Hearing Officer's ruling. Thus, although the Employer argues that these letters would show that at one point Carpenters was claiming jurisdiction over more than just "wooden form" work, we note that at the hearing a Carpenters representative admitted that Carpenters did initially claim the work as alleged by the Employer. Further, resolution of credibility issues, "the

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer is a Maryland corporation engaged in the heavy and highway construction business in the State of Maryland. During the preceding 12 months, the Employer purchased and received materials and supplies valued in excess of \$50,000 directly from points located outside the State of Maryland. On the basis of the foregoing, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Laborers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

By way of background, the general contractor on the Andre Street project in Baltimore, Maryland, is Baltimore Contractors-Koffman Construction Company, a joint venture. The Employer's portion of the project requires general land clearing and excavation, building foundation excavation, relocation of a railroad switching yard, and relocation of an existing street (McComas Street) to an area beneath the elevated interstate highway (I-95).

Under its subcontract, the Employer is obligated, regarding the reconstruction of McComas Street and related approaches to I-95, to construct approximately 7,357 linear feet of concrete curb and gutter, 9,452 linear feet of concrete highway barriers, to erect metal guard rails, and to conduct the general paving of McComas Street. The Employer began work on the McComas Street subcontract in mid-1979 with the anticipation that the work would be completed in mid-1983. The controversy herein involves the Employer's construction of the concrete highway barriers, commonly called a "Jersey barricade."

The standard or "Jersey" barrier on the Andre Street project is a barrier that is 2 feet 10 inches high and of variable width. It is constructed with the use of a metal form. In conjunction with that type of barrier, the Employer is required to con-

Board has repeatedly held that in 10(k) proceedings it is unnecessary to rule on the credibility of the testimony at issue in order to proceed to a determination of the dispute." *Essex County Building and Construction Trades Council, and its Constituent Members (Index Construction Corporation)*, 243 NLRB 249, 251 (1979). Accordingly, we find no merit in the Employer's exception.

struct transition walls which are used to reduce the height of the barrier. Transition walls are usually constructed with metal forms. However, if the transition wall curves or bends, then wood or masonite is used to construct the form in order to allow the form to curve or bend.

On November 4, 1981, the Employer started the actual construction of the concrete barrier and assigned all the work in connection therewith to its employees represented by Laborers. On the same day, the project superintendent was notified by a Carpenters representative that the work was being claimed by Carpenters. On November 16, 1981, the Employer's president, William Callahan, was informed by the Carpenters' business manager, Nicholas Bassetti, that the work should be done by employees represented by Carpenters. Bassetti asked for a meeting to discuss the matter. A meeting was held between representatives of the Employer and the two labor organizations. The parties were not successful in resolving the dispute. Employees represented by Laborers continued to perform the work.

On November 19, 1981, only a 25-foot transition section of the barrier remained to be constructed prior to shutting down for the winter. After work progressed for about an hour, carpenters engaged in a work stoppage against Baltimore Contractors, part of the joint venture, over the Employer's continued use of laborers. The Employer shut down that portion of the job and the carpenters returned to work for Baltimore Construction. After the work stoppage, the Employer made arrangements for Baltimore Contractors to lend it carpenters to complete the job.

On or about November 23, 1981, Laborers brought the subject of the dispute to the attention of the Impartial Jurisdictional Disputes Board for the Construction Industry, and that board instructed Baltimore Contractors to have the Employer proceed with the disputed work in accordance with the original assignment. Laborers also sent the Employer a letter stating that if the Employer reassigned the disputed work to employees represented by Carpenters, it would strike all of the Employer's jobs as well as the jobs of any other contractors who assigned the work to such employees. The Employer then reassigned the work to employees represented by Laborers who completed the construction of the remaining transition section.

A. The Work in Dispute

As described in the notice of hearing, the disputed work involves the setting, leveling, and securing of prefabricated metal and individually constructed wooden highway barrier forms used to form per-

manent concrete barrier walls on the Andre Street project, a portion of I-95 in Baltimore, Maryland.

B. Contentions of the Parties

The Employer contends the disputed work should be assigned to employees represented by Laborers on the basis of its collective-bargaining contract with that labor organization, its past practice, area and industry practice, the relative skills of the employees involved, and for reasons of economy and efficiency. Laborers takes basically the same position as that of the Employer.

Initially, Carpenters claimed the work of setting, leveling, and securing both prefabricated metal and custom wooden forms used in constructing on-grade concrete highway barriers on the Andre Street project. At the hearing, however, Carpenters abandoned its claim to the handling of the metal forms and claimed only the setting, leveling, and securing of wooden forms required for some of the transition walls on the Employer's job.

C. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for voluntary adjustment of the dispute. In this regard, it is well settled that the Board's authority under Section 10(k) is limited to the resolution of actual disputes between competing groups of employees.³ Here, as indicated above, at the hearing Carpenters renounced its claim to metal form work. Inasmuch as Carpenters' disclaimer of the metal form work was clear and unconditional, and as Carpenters has not engaged in any subsequent conduct inconsistent with its disclaimer, we find that competing claims to this work no longer exist.⁴ Accordingly, we conclude that the work in dispute is limited to the setting, leveling, and securing of individually constructed wooden highway barrier forms used to form permanent concrete barrier walls on the Andre Street project, a portion of I-95 in Baltimore, Maryland.

The record reveals that on November 19, 1981, carpenters engaged in a work stoppage which caused the Employer to temporarily assign the work to employees represented by Carpenters. On or about November 23, 1981, Laborers sent the Employer a letter stating that if the Employer reas-

³ *Local 1294, International Longshoremen's Association, AFL-CIO (Cibro Petroleum Products, Inc.)*, 257 NLRB 403 (1981); *Local 1396, International Brotherhood of Painters and Allied Trades, AFL-CIO (C. L. Wolff and Sons Painting Company)*, 246 NLRB 442 (1979).

⁴ See *id.*

signed the disputed work to carpenters, Laborers would strike all of the Employer's jobs as well as those of other employers who assigned such work to carpenters.

On the basis of the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Further, the parties stipulated that there is no agreed-upon method for voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

D. Merits of the Dispute

Section 10(k) of the Act requires that the Board make an affirmative award of disputed work after giving due consideration to various factors.⁵ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.⁶

1. Collective-bargaining agreements

The Employer has no employees represented by Carpenters and does not have a collective-bargaining agreement with that labor organization. On the other hand, the Employer has a collective-bargaining agreement with Laborers covering the work in dispute. This factor favors awarding the disputed work to employees represented by Laborers.

2. Employer preference

The Employer has used employees represented by Laborers to perform the disputed work. The Employer has been satisfied with the results of the assignment and prefers that these employees continue to perform the work. Thus, the Employer's preference favors an award to employees represented by Laborers.

3. Relative skills

Both groups of employees possess the skills necessary to perform the disputed work. Accordingly, this factor does not favor an award to either group of employees as opposed to the other.

4. Economy and efficiency of operations

The record clearly shows that if employees represented by Carpenters were assigned the disputed work the productivity and efficiency of the Employer's operations would be adversely affected be-

cause the Employer would not have enough of such work to keep them busy at all times. Additionally, the Employer would still be required to employ its regular employees represented by Laborers in order to perform other tasks not claimed by Carpenters. Finally, the records shows that only a small fraction of the Employer's work consists of the performance of the work in dispute. Accordingly, this factor favors awarding the disputed work to employees represented by Laborers.

5. Area practice

Testimony was presented about the practice of other highway contractors in the Baltimore area regarding the assignment of work of the type in dispute. With the exception of one contractor, all of the highway contractors who testified stated that they assign work similar to that in dispute here to laborers. Additionally, with the one exception, none of the highway contractors employ employees represented by Carpenters and none have collective-bargaining agreements with Carpenters. Accordingly, we find that the prevailing area practice favors an award of the disputed work to employees represented by Laborers.

Conclusion

The record reveals the Employer assigned the disputed work to employees represented by Laborers because of its preference. It also reveals the Employer is satisfied with the performance of these employees and desires that they continue to perform the work. Additionally, the factors of efficiency and economy of operations, area practice, and the Employer's collective-bargaining agreement favor that assignment. On the basis of the foregoing, we conclude that the employees who are represented by Laborers are entitled to perform the disputed work. In making this determination, we are awarding the disputed work to employees who are represented by Laborers, but not to that labor organization or its members. The scope of our award is limited to the controversy which gave rise to this proceeding.⁷

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

⁵ *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [Columbia Broadcasting System], 364 U.S. 573 (1961).

⁶ *International Association of Machinists, Lodge No. 1743 AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

⁷ Contrary to the Employer's contention, we find that the evidence does not clearly demonstrate the necessity for a broad award under the standards set forth in *International Brotherhood of Electrical Workers, AFL-CIO, Local 104 (Standard Sign & Signal Co., Inc.)*, 248 NLRB 1144, 1148 (1980).

Employees of Potts & Callahan, Inc., who are represented by Laborers District Council of Baltimore and Vicinity, affiliated with the Laborers International Union of North America, AFL-CIO, are entitled to perform the work of setting, level-

ing, and securing individually constructed wooden highway barrier forms used to form permanent concrete walls on the Andre Street project, a portion of I-95 in Baltimore, Maryland.